

ESTTA Tracking number: **ESTTA656584**

Filing date: **02/18/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052260
Party	Plaintiff Steven Westlake
Correspondence Address	MARK LEVY HINMAN HOWARD KATTELL LLP 80 EXCHANGE STREET, PO BOX 5250 BINGHAMTON, NY 13901 UNITED STATES mlevy@hhk.com
Submission	Other Motions/Papers
Filer's Name	Mark Levy
Filer's e-mail	mlevy@hhk.com, amanner@hhk.com
Signature	/Mark Levy/
Date	02/18/2015
Attachments	Motion to Accept Delayed Response 021815.pdf(71736 bytes) POLICE GAZETTE Response to TTAB Order to Show Cause 021815.pdf(45428 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Steven A. Westlake	)	Cancellation No.: 92/052,260
)	
Petitioner,	)	Mark: THE NATIONAL POLICE
	)	GAZETTE THE LEADING
v.	)	ILLUSTRATED SPORTING
	)	JOURNAL IN AMERICA
Edgar Alexander Barrera,)	
	)	Registration No.: 3,662,484
Respondent.)	
)	

**PETITIONER'S MOTION TO ACCEPT DELAYED RESPONSE
TO THE ORDER TO SHOW CAUSE**

Comes now Mark Levy, attorney for Petitioner Steven A. Westlake, and hereby submits a Motion to Accept Delayed Response in the above-captioned cancellation proceeding.

Due to unforeseen circumstances beyond Petitioner's control, Petitioner hereby moves this honorable Trademark Trial and Appeal Board to accept a delayed response to the Order to Show Cause dated January 28, 2015 due to excusable neglect, as described in detail in supporting Affidavits by Mark Levy and Amy Manzer, submitted herewith.

Respectfully submitted,

Dated: February 18, 2015

By:

A handwritten signature in black ink, appearing to read 'Mark Levy', is written over the printed name.

Mark Levy
Attorney for Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (607) 723-6605

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing PETITIONER'S MOTION TO ACCEPT DELAYED RESPONSE TO THE ORDER TO SHOW CAUSE in re: Steven A. Westlake v. Edgar Alexander Barrera, Opposition No. 92/052,260, was served on Respondent, this 18th day of February, 2015, by sending same via First Class Mail, postage prepaid, to:

Edgar Alexander Barrera
10 Castania Court
St. Augustine, FL 32086

Respectfully submitted,

HINMAN, HOWARD & KATTELL, LLP

Dated: February 18, 2015

By:



Mark Levy
Attorney for Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (606) 723-6605

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Steven A. Westlake	)	Cancellation No.: 92/052,260
)	
Petitioner,	)	Mark: THE NATIONAL POLICE
	)	GAZETTE THE LEADING
v.	)	ILLUSTRATED SPORTING
	)	JOURNAL IN AMERICA
Edgar Alexander Barrera,)	
	)	Registration No.: 3,662,484
Respondent.)	

AFFIDAVIT OF PETITIONER'S ATTORNEY, MARK LEVY

Mark Levy, attorney for the Petitioner, affirms the following facts.

1. On February 12, 2015, I completed a Response to the Order to Show Cause dated January 28, 2015 and forwarded same to my paralegal, Ms. Amy Manzer, by email. I expected the completed response would be filed that evening or, at the latest, the morning of February 13, 2015.

2. Although Ms. Manzer is located in my law firm's main office in Binghamton, New York, I reside in Florida.

3. In the normal course of business, I often correspond with Ms. Manzer by email.

4. Unbeknownst to me, Ms. Manzer was involved in a serious automobile accident on February 8th, due in part to an unusually heavy snow and ice storm.

5. Ms. Manzer's car was totaled.

6. Ms. Manzer failed to travel to her office on February 13th and 17th, and the office was closed due to a national holiday on February 16th.

7. Ms. Manzer visited a physician to evaluate her injured back on February 10, 2015.


8. On returning to her office on February 18, 2015, Ms. Manzer discovered the draft of the Response and notified me that it had not been forwarded to the TTAB the previous week.

9. Ms. Manzer's affidavit is submitted herewith.

10. Under these unfortunate, unforeseen, and unique circumstances, the TTAB is respectfully requested to grant Petitioner's Motion to Accept Delayed Response to the Order to Show Cause.

Respectfully submitted,

Dated: February 18, 2015

By: 
Mark Levy
Attorney for Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (607) 723-6605

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing PETITIONER'S RESPONSE TO TTAB ORDER TO SHOW CAUSE in re: Steven A. Westlake v. Edgar Alexander Barrera, Opposition No. 92/052,260, was served on Respondent, this 18th day of February, 2015, by sending same via First Class Mail, postage prepaid, to:

Edgar Alexander Barrera
10 Castania Court
St. Augustine, FL 32086

Respectfully submitted,

HINMAN, HOWARD & KATTELL, LLP

Dated: February 18, 2015

By:



Mark Levy
Attorney for Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (606) 723-6605

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Steven A. Westlake	)	Cancellation No.: 92/052,260
)	
Petitioner,	)	Mark: THE NATIONAL POLICE
	)	GAZETTE THE LEADING
v.	)	ILLUSTRATED SPORTING
	)	JOURNAL IN AMERICA
Edgar Alexander Barrera,)	
	)	Registration No.: 3,662,484
Respondent.)	

AFFIDAVIT OF PETITIONER'S ATTORNEY'S PARALEGAL, AMY MANZER

Amy Manzer, attorney's paralegal, affirms the following facts.

1. My name is Amy Manzer and I am the paralegal responsible for handling work, as assigned, by Mark Levy, Esq. in the firm of Hinman Howard & Kattell, LLP.
2. During the first week in the month of February, 2015, Binghamton, the city at which my law firm has its main office, received significant snow and ice.
3. In fact, as a cause of the snow/ice, my automobile was in a severe accident on February 8, 2015, deploying my air bags, injuring my chest and back, and totaling the car.

4. I visited a physician at the local hospital to receive medical treatment for my back on February 10, 2015.

5. Due to having to find alternate transportation, empty my totaled car, and search for a new vehicle, I was not in the office on February 13th and February 17th. The office was closed for President's Day, a national holiday, on February 16th.

6. When I returned to the office on Feb, 18th, I discovered that Mr. Levy's email with the subject Response was in my computer's email inbox.

Respectfully submitted,

Dated: February 18, 2015

By: 
Amy Manzer
Paralegal
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (607) 723-6605

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

_____ Steven A. Westlake	)	Cancellation No.: 92/052,260
)	
Petitioner,	)	Mark: THE NATIONAL POLICE
	)	GAZETTE THE LEADING
v.	)	ILLUSTRATED SPORTING
	)	JOURNAL IN AMERICA
Edgar Alexander Barrera,)	
	)	Registration No.: 3,662,484
Respondent.)	
_____)	

PETITIONER'S RESPONSE TO TTAB ORDER TO SHOW CAUSE

Comes now Mark Levy, attorney for Petitioner Steven A. Westlake, and hereby submits a response to the TTAB Order to Show Cause in the above-captioned cancellation proceeding.

PRELIMINARY STATEMENT

1. This is in response to the decision of this honorable Trademark Trial and Appeal Board dated January 28, 2015, which, *inter alia*, ordered Petitioner to show cause why this action should not be dismissed for failure to prosecute.

2. Petitioner commenced this cancellation proceeding on March 19, 2010.

3. The proceeding has languished for nearly five years because Respondent has sought numerous extensions of time to meet discovery deadlines, to retain counsel (which Respondent never did), and to recover from alleged medical emergencies.

4. Despite the Board repeatedly granting Respondent extensions and a stay of the proceedings, Respondent has failed to submit any substantive evidence to oppose Petitioner's allegations that his mark was fraudulently obtained, the mark not being used prior to April, 2007, and improperly registered.

5. Respondent also failed to timely move to dismiss when Petitioner inadvertently failed to submit evidence during Petitioner's trial period.

6. The Board, however, *sua sponte*, ordered Petitioner to show cause why Petitioner's claim should not be dismissed for failure to prosecute.

7. Whether a party has demonstrated good cause sufficient to overcome an order to show cause for failure to prosecute "is at bottom an equitable [determination]"¹

8. Based on the facts of this case and applicable law, equity strongly favors that the Board should withdraw its order to show cause, permit Petitioner to proceed with its evidentiary submissions, and allow this case to be resolved on the merits.

ARGUMENT

STANDARD

9. Whether a party has demonstrated sufficient cause to avoid dismissal for failure to prosecute is determined based on four factors:

¹ *Pumpkin, Ltd. v. Seed Corps*, 43 U.S.P.Q.2D 1582, 1586 (TTAB 1997); *see also* 37 CFR 2.132 (requiring a showing of good cause to overcome an order to show cause why a claim should not be dismissed for failure to prosecute).

(1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and, (4) whether the moving party has acted in good faith.

Melwani v. Allegiance Corp., 97 U.S.P.Q.2D 1537, 1541 (TTAB 2010).

10. Although some Courts have held the third factor may be the most important in a particular case, “the determination of whether a party’s neglect is excusable is at bottom an equitable one,” *Pumpkin, Ltd. v. Seed Corps*, 43 U.S.P.Q.2D 1582, 1586 (TTAB 1997), and “all relevant circumstances” should be considered, *Melwani*, 97 U.S.P.Q.2D at 1541.

POINT I

RESPONDENT WILL NOT BE PREJUDICED IF THE BOARD PERMITS PETITIONER TO SUBMIT EVIDENCE

11. Although Respondent’s numerous extensions caused this proceeding to languish, the extensions permitted the completion of discovery.

12. As a result, each party need only submit its evidence in order for the Board to determine this case on the merits.

13. Permitting Petitioner to reopen the proceedings will therefore not prejudice Respondent’s ability to prove his case.

14. Further, Respondent’s own actions have caused this proceeding to extend for nearly five years.

15. Respondent therefore cannot be heard to complain that prejudice will result from reopening the proceedings for the short period of time required to permit each party to submit evidence so that the Board may decide this case on the merits.

16. Because “the law favors judgments on the merits wherever possible,” *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1554 (Fed. Cir. 1991), and Respondent will not be prejudiced, this factor favors reopening the case so that Petitioner may submit the evidence he has gathered in support of his claims.

POINT II

REOPENING THE CASE SO THAT PETITIONER MAY SUBMIT EVIDENCE WILL NOT CAUSE A SIGNIFICANT DELAY OR UNDULY PREJUDICE THIS BOARD’S ADMINISTRATION OF ITS JUDICIAL PROCEEDINGS

17. Petitioner respects that this case has been before the Board for a significant amount of time.

18. However, any delay caused by reopening the proceedings will be slight. As noted, this case is nearly complete.

19. Both parties have completed discovery.

20. Each party needs only to submit its evidence to enable the Board to decide this case on the merits.

21. Thus, when all relative factors are considered – especially the numerous extensions of time the Board granted to Respondent – equity strongly favors granting Petitioner this one, relatively minor extension of time so that the case may be decided on the merits. *See Pumpkin*, 43 U.S.P.Q.2D at 1586 (equity governs dismissals for

failure to prosecute); *Hewlett-Packard Co.*, 931 F.2d at 1554 (cases should be decided on the merits, when possible).

POINT III

WHEN CONSIDERED AMONG THE TOTALITY OF CIRCUMSTANCES, THE REASONS PETITIONER FAILED TO TIMELY SUBMIT EVIDENCE DO NOT WARRANT DISMISSAL

22. Petitioner's failure to submit evidence primarily resulted from the difficulty Petitioner has endured to continue publishing *The National Police Gazette* on a monthly basis while simultaneously remaining abreast of and responding to Respondent's numerous requests for extensions and stays.

23. Trial dates for this proceeding have been set and then resent three times, adding to the confusion due to Respondent's repeated requests for adjournments on May 7, 2010, August 13, 2010, October 8, 2010, January 7, 2011, April 6, 2011, October 11, 2011, November 10, 2011, December 12, 2011, January 3, 2012, January 6, 2012, February 3, 2012, March 14, 2012, May 11, 2012, July 15, 2012, November 13, 2012, January 21, 2013, and October 6, 2013.

24. Respondent's failure to timely submit initial disclosures and repeated news of Respondent's arrests for offenses involving drugs, fraud, and violence caused Petitioner to increasingly investigate the facts surrounding this dispute so that Petitioner could properly respond to Respondent's numerous motions. See Ex. A.

25. Respondent's actions, including requesting adjournments for transporting a sick relative to the hospital and alleging illness that made it impossible to assist his attorney, difficulty retaining substitute counsel, and impossible to proceed *pro se*, but

being well enough to update his Facebook page under the pseudonym, Alexander Patrick, and to be arrested for assault (Ex. B) and his enlistment of his non-attorney sister to represent him, constitutes an abuse of process.

26. “The elements of a claim for abuse of process are: (1) an ulterior motive; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.” *Ferrari S.p.A. Esercizio Fabbriche Automobili E Corse v. McBurnie Coachcraft Inc.*, 10 U.S.P.Q.2d 1278, Civ. No. 86-1812-B(IEG), 1988 U.S. Dist. LEXIS 16314, at *30 (S.D. Cal. Aug. 31, 1988).

27. Here, Respondent sought extensions of time on 18 occasions to obtain new counsel. However, this Board found that Respondent’s efforts to secure counsel were insufficient as a matter of law and, to date, Respondent remains unrepresented.

28. Respondent’s numerous extensions were therefore veiled attempts to unduly delay this proceeding. Under the law, such conduct amounts to an abuse of process. *See Ferrari S.p.A.*, supra. In light of such abuse, equity strongly favors permitting Petitioner to submit evidence so that the case may be decided on the merits.

29. Petitioner respectfully asserts that the foregoing reasons for the delay are understandable in light of how this case has proceeded.

30. When considered among the totality of factors discussed herein, Petitioner respectfully believes that equity favors permitting Petitioner to reopen these proceedings. *See Melwani v. Allegiance Corp.*, 97 U.S.P.Q.2D 1537, 1541 (TTAB 2010) (holding the Board should consider “all the relevant circumstances” when deciding whether to dismiss a case for failure to prosecute).

POINT IV
PETITIONER HAS PROCEEDED IN GOOD FAITH,
RESPONDENT HAS NOT

31. Petitioner has always acted in good faith throughout the course of these proceedings.

32. Petitioner responded to each of Respondent's motions, and did not oppose several of Respondent's initial requests for extensions.

33. Further, Petitioner's Amended Petition included substantial documentary evidence which laid bare the thrust of Petitioner's claim so that Respondent could prepare a defense.

34. Petitioner has never abandoned his claim.

35. Respondent, however, has demonstrated bad faith throughout this case, his actions being tantamount to perpetrating fraud on the U.S. Patent and Trademark Office.

36. As stated hereinabove, Respondent's numerous extensions were veiled attempts to unduly delay this proceeding.

37. Under the law, such conduct amounts to an abuse of process. *See Ferrari S.p.A.*, supra.

38. Most notably, after delaying these proceedings for eleven months so that he could retain new counsel, Respondent never retained counsel and is prosecuting this case *pro se*.

39. Further, during the time which Respondent sought extensions to recover from medical emergencies, Respondent was arrested for offenses involving drugs, fraud, and assaulting a police officer. See Ex. A.

CONCLUSION

40. For the majority of the nearly five years during which this proceeding has pended, Petitioner has diligently prosecuted this case in spite of the 18 requests for adjournments, delays and complications Respondent has caused.

41. This case is now nearly complete and can be resolved on the merits.

42. The Board has granted Respondent numerous extensions of time despite the bad faith Respondent has exhibited.

43. Petitioner should be granted this one extension of time to submit evidence.

Respectfully submitted,

HINMAN, HOWARD & KATTELL, LLP

Dated: February 18, 2015

By:



Mark Levy
Attorney for Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (607) 723-6605

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing PETITIONER'S RESPONSE TO TTAB
ORDER TO SHOW CAUSE in re: Steven A. Westlake v. Edgar Alexander Barrera,
Opposition No. 92/052,260, was served on Respondent, this 18th day of February, 2015,
by sending same via First Class Mail, postage prepaid, to:

Edgar Alexander Barrera
10 Castania Court
St. Augustine, FL 32086

Respectfully submitted,

HINMAN, HOWARD & KATTELL, LLP

Dated: February 18, 2015

By:


Mark Levy
Attorney for Petitioner
80 Exchange Street
P.O. Box 5250
Binghamton, NY 13901
Tel: (607) 231-6830
Fax: (606) 723-6605